viso exempts the policy from those claims participating in the distribution of the estate, it thereby gives to those not sharing in the distribution thereof the right to subject the policy in payment of their claims. Thus by a negative implication the very purpose for which the proviso was enacted is subverted, and it is to be expected that creditors in bankruptcy will soon discover the effect of the decision and use it to their best advantage.

The actual decision in the instant case is probably sound, for the reason that no discharge of the bankrupt estate could possibly have been obtained because there was no application for the discharge within eighteen months subsequent to the adjudication; hence any creditor could subject any of the assets of the new estate to the payment of his claim. This is necessarily so, since there is no discharge to be pleaded in bar of the action, nor is the bankrupt entitled to a stay of proceedings under § 11a. But this reason is not even mentioned in the case, the court basing its decision on the ground that § 70a (5) was controlling. Thus, we see that by a strict application of § 70a (5) creditors are given the right to subject life insurance policies to the payment of their claims when they cannot touch the other property of the new estate of the bankrupt. The unsoundness of this doctrine becomes apparent when it is considered that the very purpose of the proviso was to save the policy to the bankrupt free from the claims of creditors.

LEGAL HISTORY OF TRADE UNIONS.—The basis of our common law has its origin in the ancient laws of England. When the United States severed relationship with that country, the old common law was lifted up bodily and ingrafted into the basic law of this country. This being true, it is all important to a correct determination of the questions discussed here, to determine: (1) just what was the common law, prior to the birth of the United States, as regards these labor organizations; and (2) how far that law has been repealed or modified by legislative enactment in the United States as concerns interstate relations and in the several sovereign States as concerns intrastate relations. It is deemed proper, therefore, to review the legislation and judicial decisions touching the rights, privileges and obligations of labor unions in England as well as our federal and local state laws and decisions. In doing this, the legislation and decisions of England, subsequent to the Revolution, become immaterial, except in so far as they may aid us in defining the true principles of the common law existing prior to 1776, and still existing in this country.

Bearing this in mind, Judge Dayton, in *Hitchman Coal Co.* v. *Mitchell,*[1] found the following outline to be the substance of the common law, and the rules which the courts have laid down, by which rules the legality or illegality of trade unions is to be de-

[1] 202 Fed. 512.

termined. 1. The first question that presents itself is whether the union is created for an unlawful purpose, or though created for a lawful purpose, whether the means adopted to make it effective are unlawful and oppressive.[2] In either case the combination amounts to a conspiracy and its members become liable as conspirators. Thus, seeking to increase wages peacefully is, in itself, lawful, but when accompanied by threats, coercion, intimidation and violence, it becomes unlawful.[3] So when the primary purpose is not to raise wages or seek better working conditions, but to paralyze interstate commerce, it amounts to an unlawful conspiracy although this object is sought to be accomplished by peaceful means.[4] By unlawful, in this connection, we mean not unlawful, merely in the sense that its members will be amenable to the criminal laws, but also in the sense that they become civilly liable for damages.[5] II. In answering the question the trade unions must be considered in their threefold relation: (1) To their own members; (2) to those who may employ such members; and (3) to the public interest, (a) of non-union labor, and (b) of the public generally. Thus a union is unlawful if, in its constitution, it compels its members to surrender their individual freedom of action;[6] or if it seeks to control the employer and restrict, if not destroy, his right to contract with employees, or excludes his right altogether to employ non-union men;[7] or if it seeks to compel all workers to become union men whether they wish to or not, by forbidding its members to work with non-union laborers.[8] III. To determine their legality one must examine the constitution, rules and by-laws of the union, and, if any clauses of unlawful character be found, of such weight and importance as to dominate the union's action, the organization will be wholly illegal.[9]

Having decided what constitutes lawful and what unlawful combinations and associations, we next determine under what cir-

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[2] See National Fireproofing Co. *v.* Mason's Builder's Ass'n, 169 Fed. 259.

[3] Iron Molder's Union *v.* Allis-Chalmers Co., 166 Fed. 45.

[4] Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803.

[5] Hornby *v.* Close, L. R. (1867) 2 Q. B. 153. In delivering the opinion of the court, Cockburn, C. J., said: "Under that term may be included every combination by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority. I am very far from saying that the members of a trades union constituted for such purposes would bring themselves within the criminal law; but the rules of such a society would certainly operate in restraint of trade, and would, therefore, in that sense, be unlawful." This is an old case and can hardly be said to be declaratory of the common law as it exists in this country today, but still it goes to show to what extent this doctrine has been carried.

[6] Hitchman Coal Co. *v.* Mitchell, *supra.*

[7] Galamorgan Coal Co. *v.* South Wales Miner's Federation, L. R. (1903) 2 K. B. 545.

[8] Hitchman Coal Co. *v.* Mitchell, *supra;* Russell *v.* Amalgamated Society, etc L. R. (1910) 1 K. B. 506.

[9] Hitchman Coal Co. *v.* Mitchell, *supra.*

cumstances they may be enjoined and punished. In connection with this it is well to consider a Federal Statute of 1886, entitled "An act to legalize the incorporation of National Trades Unions." [10] This act does not, in any way, sanction illegal combinations, nor the use of lawful organizations for an unlawful purpose. It simply provides that trade unions be recognized as having a legal existence.[11] In order for one injured by trade unions and combinations of this character to have a cause of action, it must first be shown that the combination amounted to a conspiracy. Therefore, it is not sufficient merely to show that injury resulted, but, in addition, it must be shown that the initial purpose was to injure some third person, or to do an act lawful in itself, but to be accomplished by unlawful means. That is the criterion. If the primary purpose is in reality for the benefit of its members and lawful methods are pursued, it is not a conspiracy even though it may indirectly injure the employer's business.[12] The converse of this is also true; namely, that if it were entered into for the primary purpose of injuring another, it is not rendered valid by the fact that it may incidentally benefit the parties thereto.[13] To warrant such an action damages must have resulted from the combination.[14] But a court of equity will entertain a suit for a preliminary injunction, where damage is not actually done, but merely threatened.[15] Generally it is outside the scope of equity jurisdiction to enjoin the commission of crimes, for a court of equity has no criminal jurisdiction. But if there be interferences, either actual or threatened, with property rights, jurisdiction attaches and is not destroyed by the fact that such interferences are accompanied by, or are themselves violations of, the criminal laws. The question has arisen as to whether the relation of the Federal Government to interstate commerce is such as would authorize a direct interference to prevent a forcible obstruction thereto, or whether such action would be exclusively within the hands of the individual owners. In the case of *In re Debs*,[16] it was decided that the Federal Government had such a right, upon the principle that the power to regulate interstate commerce, given to that government by the Federal Constitution, had been exercised by the

[10] 24 Stat. 86, 7 Fed. Stat. Ann. 334.

[11] Arthur *v.* Oakes, 63 Fed. 310. See also Farmer's Loan, etc., Co. *v.* Northern Pacific R. Co., 60 Fed. 803.

[12] National Fireproofing Co. *v.* Mason's Builder's Ass'n, *supra.*

[13] National Fireproofing Co. *v.* Mason's Builder's Ass'n, *supra.* See also Loewe *v.* California State Federation of Labor, 139 Fed. 71.

[14] National Fireproofing Co. *v.* Mason's Builder's Ass'n, *supra.*

[15] Loewe *v.* California State Federation of Labor, *supra.* Judge Morrow, in delivering his opinion, said: "The word 'boycott' is in itself a threat. In its popular acceptation, it is an organized effort to exclude a person from business relations by persuasian, intimidation, and other acts which amount to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs."

[16] 158 U. S. 564. See also Union Pacific R. Co. *v.* Ruef, 120 Fed. 102.

enactment of interstate commerce laws, and that therefore the power was not merely dormant, but active.

All that has hitherto been said is applicable alike to Federal and State Courts. It is necessary here, however, for a correct understanding of the situation, to draw a distinct line between Federal and State legislation and decisions and discuss each separately, since much of the modern law concerning trade unions is governed by statutes. In 1890, the famous Sherman Anti-Trust Law [17] was passed which, in so far as it applies to trade unions, is simply declaratory of the common law, re-enacting it and making it more effective. The statute simply provides that trusts and combinations in restraint of interstate and foreign trade shall be unlawful, without declaring what is meant by restraint of trade, and recourse must therefore be had to the common law for a proper definition of this general term.[18] This act is not directed entirely at capital, nor is the evil contemplated one of contractual character only, but it applies equally to combinations and conspiracies to restrain trade by force and violence, making them *per se* illegal without an affirmative act if such is their expressed or designed purpose.[19] Section 7 [20] provides that any person injured in his business or property by any person violating this act, has a right to recover threefold the actual, not speculative [21] damages sustained by him.[22] But the person injured under this act cannot sue for an injunction. Such remedy may be exercised only by the Federal Government through its district attorney.[23] Every member of the illegal combination is individually liable for the injury resulting to the business or property of the plaintiff by reason of such combination, regardless of any contract relation between him and the plaintiff.[24]

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[17] 26 Stat. 209, 7 Fed. Stat. Ann. 336. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[18] *In re* Greene, 52 Fed. 104.

[19] United States *v.* Debs, 64 Fed. 724.

[20] 26 Stat. 210, 7 Fed. Stat. Ann. 345, U. S. Comp. Stat. '16, § 8829. "Any person who shall be injured in his business or property by any other person or corporation by reason of any thing forbidden or declared to be unlawful by this act, may sue therefore in any circuit of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee."

[21] Central Coal, etc., Co. *v.* Hartman, 111 Fed. 96.

[22] See Southern Indiana Express Co. *v.* United States Express Co., 88 Fed. 659; Greer *v.* Stoller, 77 Fed. 2.

[23] See Southern Indiana Express Co. *v.* United States Express Co., *supra;* National Fireproofing Co. *v.* Mason's Builder's Ass'n, *supra.*

[24] City of Atlanta *v.* Chattanooga Foundry, 127 Fed. 23.

Again, in 1898 a Federal Act was approved, entitled, "An Act Concerning Carriers Engaged in Interstate Commerce and Their Employees," [25] the substance of section 10 [26] of which was to forbid employers of interstate common carriers to discharge or refuse to hire union labor. This section was declared unconstitutional by the Federal Court, in the case of *United States* v. *Scott,*[27] on the ground that it was in violation of the fifth amendment to the Federal Constitution in that it deprived the employer of the right to contract with whom he pleased. But two years later this case was overruled by the court in *United States* v. *Adair,*[28] thereby reinstating section 10 of the Act. The reasoning is unanswerable. It is a settled fact, that, to be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice, is a part of every man's civil rights,[29] and any infringement on this right is prohibited to both the Federal and State legislatures by the Federal Constitution. Congress has, however, exclusive right to regulate interstate commerce, the fifth amendment being a limitation on this power. A limitation to what extent? It was shown by the passage of the Anti-Trust Act of 1890, and by its being pronounced constitutional, that the right of railroad corporations or of any corporation to make unreasonable contracts in restraint of interstate commerce is not so protected. In view of this, one must conclude that it is only such a liberty which is reasonable and proper that should not be subject to invasion by Congress under its commercial powers, and that is protected therefrom by the amendment. Is this, then, a reasonable and proper liberty? A person engaged in a lawful private business and a common carrier engaged in interstate commerce occupy entirely different positions. The former has a fundamental right upon his own choice to engage in and carry on such business. The latter has no such right. It exercises a public function simply by consent of the Federal Government expressed or implied. Whatever may be the control that a State or the United States may exercise over a person engaged in private business, in the matter of liberty of action, it is reasonable to hold that it has sufficient control over a common carrier to enable it to bring about an efficient performance of the public function with which it is entrusted, and to prevent action on its part that may cause an interruption of the performance thereof; and the government reserved to itself the power to control it to an extent reasonably necessary to secure that result. Therefore, the fifth amendment does not protect such

[25] 30 Stat. 428, 4 Fed. Stat. Ann. 784.

[26] 4 Fed. Stat. Ann. 787. "Any employer subject to the provisions of this Act * * * who shall require any employee, or any person seeking employment, as a condition precedent to employment, to enter into any agreement, either written or verbal, not to become or remain a member of any labor corporation, or organization, * * * is hereby declared to be guilty of a misdemeanor, * * *."

[27] 148 Fed. 431. [28] 152 Fed. 737

[29] Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176.

liberty of action calculated to provoke strikes, boycotts and lockouts, and cause a cessation of interstate commerce. By parity of reasoning, this would not be true of any other corporation or individual than one exercising a public function.

In 1914 an amendment was made to the Federal Anti-Trust Law excepting from the purview of the Act, labor unions, etc., organized for a lawful purpose.[30] This amendment, if constitutional, has the effect of throwing us back to the law as existed prior to 1890; namely, that their legality is to be determined solely on the question whether or not they amount to a conspiracy. A state statute of Nebraska containing an exemption identical with this, was declared to be unconstitutional as violating the fourteenth amendment to the Federal Constitution, in that it denied to some the equal protection of the laws.[31] But the same cannot be true in regard to a Federal statute, since there is no clause in the constitution prohibiting Congress to pass class legislation. The fourteenth amendment unfortunately is a restriction only on the States.[32] As to the feasibility and constitutionality of a statute making it an offense to declare or cause a lockout or strike, or to incite, encourage or aid in so doing, see "The Thirteenth Amendment and the General Railway Strike." [33]

It is only possible within the scope of this note to digest the authority of one single State as illustrative of the general attitude of all state legislation towards trade unions. Common law, unchanged by statute, is in full force in Virginia modified somewhat by the everchanging public sentiment and opinion. Any attempt, therefore, by force, threat or intimidation to deter or control an employer in the determination of whom he will employ, or what wages he will pay, is an act of wrong and oppression, and every

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[30] 30 Stat. 731, 8 U. S. Comp. Stat. '16, § 8835f. "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

[31] Niagara Fire Ins. Co. *v.* Cornell, 110 Fed. 816. In delivering the opinion of the court, Judge McPherson said: "By saying that associations of laboring men are exempt from the provisions of the statute, it is thereby stated, in meaning, that unorganized labor must pay the penalties of a criminal act done by a member of an organization, and by him done with impunity. On one side, by this legislation, we have organized labor. Those men are not amenable to the statute. On the other side we have men who do not belong to labor organizations, farmers, merchants, laborers, as well as all others. They are amenable, and by this statute that is called 'equal protection.' * * *."

[32] See United States *v.* Adair, *supra.*

[33] 4 VA. LAW REV. 437. Article by Blewitt Lee.

combination for such a purpose is an unlawful conspiracy. The law will protect the victim and punish the promoters of such combinations. The offense is the combination for the unlawful purpose, accompanied by malice, and no overt act is necessary to constitute it.[34] But where the purpose is to increase wages and seek better working conditions by peaceful means, the combination is not unlawful, although the members persuade and entice non-union laborers to leave the employer by peaceful persuasion. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable unless there is actual malice. Malice, as here used, does not mean merely an intent to harm, but it means an intent to do a wrongful harm or injury, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done with intent and purpose of injuring another is not lawful competition.[35]

Power is given the Virginia General Assembly, by the State Constitution [36] of 1902, to enact laws preventing all trusts, combinations and monopolies inimical to the public welfare, but so far no statute has ever been passed on the subject.

CONSTRUCTION OF THE ESPIONAGE ACT.—With the gradual disappearance of the public intolerance during the period of war fever, the severe restrictions on liberal discussion of the origin, nature and policies of the war which were enforced by the Federal Courts in construing the Espionage Act, are becoming very evident. Inconsistencies of interpretation and indifference to settled principles of construction of criminal statutes, together with its unusual political aspects, have evoked vigorous criticism and demand for the repeal of the Act and amnesty for political prisoners thereunder convicted.[1]

As originally enacted, three offenses were established by the Act: (1) false statements or reports interfering with naval or military operations or promoting the success of enemies of the United States; (2) causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval

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[34] Crump *v.* Commonwealth, 84 Va. 927, 6 S. E. 620.

[35] Everett Waddey Co. *v.* Richmond Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792.

[36] Article 12, § 165.

[1] See article "Freedom of Speech in War Time" by Zechariah Chafee, Jr., 32 HARV. LAW REV. 932. Also see "The Debs Case and Freedom of Speech" by Ernst Freund, 19 NEW REPUBLIC 13. Many cases involving the Espionage Act are printed in the BULLETINS OF THE DEPARTMENT OF JUSTICE ON THE INTERPRETATIONS OF WAR STATUTES. A valuable collection of cases decided before July 1918 has been published by Walter Nelles in a pamphlet, "ESPIONAGE ACT CASES," published by the National Liberties Bureau, New York.